No. 12915

In The United States Court of Appeals

For the Ninth Circuit

J. J. O'LEARY, Deputy Commissioner, Fourteenth Compensation District, under the Longshoremen's Act, *Appellant*,

vs.

COASTAL NAVIGATION COMPANY, a corporation; FIREMEN'S FUND INSURANCE COMPANY, a corporation, *Appellees*,

GENEVIEVE LONG, *Amicus Curiae*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION
HONORABLE DAL M. LEMMON, *Judge*

BRIEF OF AMICUS CURIAE

BASSETT & GEISNESS,
Attorneys for Amicus Curiae.

Office and Post Office Address:
811 New World Life Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

No. 12915

In The United States Court of Appeals
For the Ninth Circuit

J. J. O'LEARY, Deputy Commissioner, Fourteenth Compensation District, under the Longshoremen's Act, *Appellant*,

vs.

COASTAL NAVIGATION COMPANY, a corporation; FIREMEN'S FUND INSURANCE COMPANY, a corporation, *Appellees*,

GENEVIEVE LONG, *Amicus Curiae*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION
HONORABLE DAL M. LEMMON, *Judge*

BRIEF OF AMICUS CURIAE

BASSETT & GEISNESS,
Attorneys for Amicus Curiae.

Office and Post Office Address:
811 New World Life Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

INDEX

TABLE OF CASES

STATUTES

In The United States Court of Appeals

For the Ninth Circuit

J. J. O'LEARY, Deputy Commissioner, Fourteenth Compensation District, under the Longshoremen's Act, *Appellant*, vs. COASTAL NAVIGATION COMPANY, a corporation; FIREMEN'S FUND INSURANCE COMPANY, a corporation, *Appellees*, GENEVIEVE LONG, *Amicus Curiae*.	No. 12915

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION
HONORABLE DAL M. LEMMON, *Judge*

BRIEF OF AMICUS CURIAE

PRELIMINARY STATEMENT

This court heretofore made and entered its order permitting the filing of a brief *amicus curiae* on behalf of Genevieve Long, who was the claimant before the Deputy Commissioner, and intervenor in the trial court.

This brief is filed to add a supplementary argument to the Government's, not to repeat the same.

SUMMARY OF ARGUMENT

The District Court applied an erroneous standard to the facts.

Union Oil Company v. Pillsbury, 63 F.(2d) 925;

Puget Sound Navigation Company v. Marshall, 31 F.Supp. 903;

Taylor v. McManigal, 89 F.(2d) 583;

Diomede v. Lowe, 87 F.(2d) 296.

ARGUMENT

(a) The Government's argument

The Government argues that the court erred in redetermining the Commissioner's finding of fact.

(b) Amicus Curiae supplementary argument

The District Court, in holding that there was no evidence to sustain the Commissioner's finding, applied an improper legal standard.

The District Court in its memorandum properly stated that it had no power to weigh or appraise the evidence and that if there was evidence to support the order it must be sustained (Tr. 16). Then in setting up the standard by which the court thought to determine whether there were facts to support the findings, the court said:

> "The remedy under the act is exclusive. It was designed to provide compensation in the stead of liability for a class of employees commonly known as longshoremen. These men are mainly employed in loading, unloading, refitting and re-

pairing ships, Senate Report No. 973, 69th Congress, First Session, page 16. *Long's work cannot be said to fit into that category.*" (Emphasis supplied)

While the act may have been primarily designed to include a certain large class of workers, Congress in setting up the legislation broadened its scope to include all maritime workers, save a "master or member of a crew of any vessel * * *" and certain other immaterial exceptions (note that the congressional report used the word "mainly").

The words of the act are:

> "(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry-dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law. No compensation shall be payable in respect of the disability or death of—(1.) a master or member of a crew of any vessel * * *." 33 U.S.C.A. Sec. 903. See also the definitions contained in 33 U.S.C.A. Sec. 902.

Thus it is to be seen that the act was designed to be the catch-all; to cover all maritime injuries occurring except to those who might validly be covered by State compensation acts and members of crews of vessels. In other words, the compensation under the act is not limited to the particularly large class of workers for whose benefit it was primarily intended, to wit, Longshoremen and Ship Refitters and Repairmen. It is

not necessary to prove that a maritime injury comes under the act, but rather it comes under the act unless it is excluded. This is born out by the presumption specifically stated in the act as follows:

> "In any proceeding for the enforcement of a claim for compensation under this chapter, it shall be presumed, in the absence of substantial evidence to the contrary—(a) That the claim comes within the provisions of this chapter." (33 U.S.C.A., Sec. 920).

Long's death having been unquestionably (and now concededly since the employer did not cross-appeal) caused by maritime injury, the question then becomes solely whether he was excepted from the act as being "a member of a crew." Not whether his duties fell into the category of the principal class of workers for whose benefit the act was adopted.

Was Long a "member of a crew" of a vessel? The District Court conceded that Long's main duties were to keep watch (Tr. 15). All of his other duties were those commonly associated with caretaking. In fact, the deceased was taking care of two vessels. The company carried Long on its payroll as a watchman (Tr. 26, 27). (The two exhibits so showing were admitted into the record by oral stipulation which is not contained in the present transcript of record but which counsel is orally informed will be made a part of a supplementary record.)

The court must construe the words used by the legislature "a member of a crew of any vessel." Amicus Curiae contends that the term has been construed adversely to the contention of respondents herein. Three

cases were cited to, but not by, the District Court which amicus curiae feels are inconsistent with the construction of the District Court.

Union Oil Company v. Pillsbury (9 Cir.) 63 F.(2d) 925;

Puget Sound Navigation Company v. Marshall, 31 F.Supp. 903;

Taylor v. McManigal, 89 F.(2d) 583.

A fourth case, equally strong, is *Diomede v. Lowe*, 87 F.(2d) 296, wherein it was specifically stated at page 298:

> "Nor was the decedent a member of a crew. A watchman on a vessel in port is not a seaman excluded by the statute. * * *"

The case of *Union Oil Company v. Pillsbury*, 63 F. (2d) 925, is closely parallel to the case at bar. There one who served as third mate on a vessel while it was on its last voyage stayed on the ship as caretaker when the ship was tied up and this court held that he was covered by the Harbor Workers Act and was not a member of a crew of a vessel.

So in *Puget Sound Navigation Co. v. Marshall*, 31 F.Supp. 903, the injured man was a watchman who sailed on a vessel as a member of the crew when she was in service, which was on weekends, and stayed on the vessel as watchman and caretaker when she was tied-up during the week. The accident occurred while the vessel was tied-up during the week, and the court held that the employee was not a member of the crew of a vessel, so as to be excepted from the Harbor Workers Act.

Likewise, in *Taylor v. McManigal*, 89 F.(2d) 583, the Court of Appeals for the Sixth Circuit held that a man who was employed as an assistant engineer to help put the ship in repair and who expected to sail as a member of the crew as an engineer when the vessel sailed, was covered by the provisions of the Harbor Workers Act.

The duties performed at the time of the injury or death are those which determine the applicability of the act, and not the duties over any extended period of time. *Gallagher's* case, 145 F.(2d) 516, 1945 A. M.C. 143. Thus one may be a member of a crew one day and be outside the act and a watchman or caretaker the next day and be within the act. *Puget Sound Navigation Company v. Marshall*, 31 F.Supp. 903. Thus the circumstances that Long had at one time been a member of the crew and that the employer contended that if the ship ever sailed he was to be carried as a member of the crew are immaterial.

In order to be a member of a crew there must first be a "crew." See *Diomede v. Lowe*, 87 F.(2d) 296. In that case, it was said at page 298:

> "In *Seneca Washed Gravel Corp. v. McManigal*, *supra* (65 F.(2d) 779) we defined the word 'crew' as used in the statute. The word 'crew' is used in the statute to connote a company of seamen belonging to the vessel, usually including the officers."

No doubt there can be a one-man crew. *Norton v. Warner*, 321 U.S. 564, 88 L. ed. 931. But this could only be true if the one-man could navigate the vessel. To what crew did Long belong? Was he a member of

the crew of the Coastal Monarch, or was he a member of the crew of the Coastal Glacier? Which vessel had a crew? Since both vessels require a multi-man crew in order to engage in navigation, it is respectfully submitted that Long himself could not constitute a crew of either vessel, let alone both.

The District Court apparently adopted the view that if the injured or deceased employee performed some duties that were customarily performed by crew members, then he was outside the act. This, of course, was the standard of *International Stevedoring v. Haverty*, 272 U.S. 50, 71 L. ed. 157, which is not now applicable to this Act. *South Chicago Coal & Dock Co., v. Bassett*, 309 U.S. 251, 84 L. ed. 732.

CONCLUSION

It is respectfully submitted that there was ample evidence to support the Commissioner's ultimate finding that Long was not a member of a crew of a vessel under the proper construction of those terms and that the decision of the trial court should be reversed and the order of the Commissioner reinstated.

Respectfully submitted,

BASSETT & GEISNESS,
Attorneys for Amicus Curiae.